Supreme Court, U.S.
FILED
JUL 1 2005
OFFICE OF THE CLERK

No. 05-43

In The

Supreme Court of the United States

VINCENT A. CIANCI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. MACFADYEN
Counsel of Record
MACFADYEN, GESCHEIDT & O'BRIEN
The Owen Building
101 Dyer Street
Providence, RI 02903
(401) 751-5090

Attorney for Petitioner
Vincent A. Cianci, Jr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Citation to Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. The Indictment	4
B. The Trial	7
C. The Appeal	9
Reasons for Granting the Petition	11
I. RICO	11
A. Varying Approaches	14
B. Decision Below Incorrect	17
II. RULE 803(3)	20
A. The Conflict	20
B. Decision Below Incorrect	27
Conclusion	30

TABLE OF AUTHORITIES

Page

CASES

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 12

Chang v. Chin, 80 F.3d 1293 (9th Cir. 1996) 18

Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) 17

Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892) 21, 22, 23, 28

Reves v. Ernst & Young, 507 U.S. 170 (1993) 7

Russello v. United States, 464 U.S. 16 (1983) 28

Ryan v. Clemente, 901 F.2d 177 (1st Cir. 1990) 4, 14

Shepard v. United States, 290 U.S. 96 (1933) 22, 23

Stephens, Inc. v. Geldermann, 962 F.2d 808 (8th Cir. 1992) 16, 18

United States v. Arthur, 949 F.2d 211 (6th Cir. 1991) 25

United States v. Cianci, 210 F.Supp.2d 71 (D.R.I. 2002) 3, 7

United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) ....*passim*

United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984) 21

United States v. DiMaria, 727 F.2d 265 (2nd Cir. 1984) 21, 24

United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989) 9, 15, 17, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Jackson, 780 F.2d 1305 (7th Cir. 1986) 26

United States v. Lawal, 736 F.2d 5 (2nd Cir. 1984) 24

United States v. LeMaster, 54 F.3d 1224 (6th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) 21, 24, 25

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989) 29

United States v. Peak, 856 F.2d 825 (7th Cir. 988) ... 21, 24, 29

United States v. Perlholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 16

United States v. Ponticelli, 622 F.2d 985 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980) 21, 24, 25, 26

United States v. Reyes, 239 F.3d 722 (5th Cir.), *cert. denied*, 533 U.S. 961 (2001) 21, 24, 25, 26

United States v. Thompson, 685 F.2d 993 (6th Cir 1982), *cert. denied sub nom., Sisk v. United States*, 1459 U.S. 1072 (1982) 18

United States v. Turkette, 452 U.S. 576 (1981) ... 11, 12, 13, 19

Vandenbroeck v. Common Point Mortgage Company, et al., 210 F.3d 696 (6th Cir. 2000) 16, 18

STATUTES AND RULES

United States Code

18 U.S.C. § 1961 ..... 2, 3, 5, 14

18 U.S.C. § 1962 12

Federal Rules of Evidence

F.R.Evid. 403 29

F.R.Evid. 801 22

F.R.Evid. 803 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

American Law Institute, *Model Code of Evidence* (1942) 27

McLaughlin, *Weinstein's Federal Evidence* (2nd ed. 2002) 29

Saltzburg, *et al.*, *Federal Rules of Evidence Manual* (8th ed. 2002) 21, 29

Strong, *et al.*, *McCormick on Evidence* (1999) 21

Valori, *Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. Miami L.Rev. 481 (1993) 21

PETITION FOR WRIT OF CERTIORARI

Vincent A. Cianci, Jr. prays that a writ of *certiorari* issue to review the decision of the United States Court of Appeals for the First Circuit entered on August 10, 2004.

CITATION TO OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 378 F.3d 71 and is reproduced in Appendix A. The Order of the First Circuit denying petitioner's request for rehearing and for rehearing *en banc* is reproduced in Appendix B. The judgment of the First Circuit is reproduced in Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was entered on August 10, 2004. A timely petition for rehearing and for rehearing *en banc* was denied on October 8, 2004. The judgment was entered on April 5, 2005. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

F.R.Evid. 803(3):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

18 U.S.C. § 1961:

As used in this chapter –

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

STATEMENT OF THE CASE

This cases poses two significant issues for review:

- First, whether the definition of RICO enterprise under 18 U.S.C. § 1961 encompasses an association-in-fact allegedly formed for the unlawful purpose of enriching its individual members through criminal activity, where the association includes municipal entities which do not share that illicit purpose, but are instead the passive instruments through which the defendants effectuate sporadic acts of racketeering.

- Second, whether F.R.Evid. 803(3) authorizes the trial court to exclude relevant statements of then-existing future intention on the ground that the court has "doubt" concerning the declarant's sincerity, or finds his sincerity "unclear," or whether, to the contrary, the Rule leaves the question of the hearsay declarant's credibility to the jury.

The RICO issue is presented here in high relief because the entities alleged to have participated in the illegal-purpose enterprise included a municipal corporation – the City of Providence, Rhode Island – and certain of its departments, which by charter and operation of law can function only for lawful purposes. It is sharpened by the explicit findings of the trial court that "there is no evidence that the [City] departments and/or agencies, themselves, shared [the enterprise's] purposes," *United States v. Cianci*, 210 F.Supp.2d 71, 73 (D.R.I. 2002) (*Cianci I*), and that "none of [defendants' racketeering] acts, . . . resulted in any significant disruption of a Governmental function." *Id.*

Nevertheless, a majority of the Court of Appeals for the First Circuit found that a shared illegal intent could be "imputed to the City," thereby establishing an association-in-fact under 18 U.S.C. § 1961, even in the absence of any ascertainable structure of ongoing illegality, where the individual members of the enterprise were City officials who had legal and functional authority over the entities which they episodically exploited to commit illegal acts. *United States v. Cianci, et al.*, 378 F.3d 71, 84 (1st Cir. 2004) (*Cianci II*). Dissenting, Circuit Judge Howard observed that, in permitting "a person or entity to be named part of an unlawful purpose enterprise on mere evidence that the person or entity acceded to a mobster's

request (but without knowledge of the purposes underlining the request), we would be heading down the slippery slope against which then-Judge Breyer warned in *Ryan* [*v. Clemente*, 901 F.2d 177 (1st Cir. 1990)]: that of failing to differentiate between associations that fall within the sweep of RICO and associations involving only the exploitation of others by criminals." *Id.* at 111.

The First Circuit also upheld the trial court's exclusion under F.R.Evid. 803(3) of an exculpatory statement of intention by the defendant, which was caught on tape by a wired FBI *poseur* in the middle of the alleged conspiracy, on the ground that the Court had "doubts" about the defendant's sincerity in making the statement, thereby removing the question of defendant's credibility from the jury. This ruling adds a new interpretation – to date the most extreme – to an already conflict-laden array of Circuit decisions concerning the role of judge and jury in admitting or excluding state-of-mind hearsay under F.R.Evid. 803(3). This question is important not because of its complexity, but because of its everyday occurrence in federal litigation. It is bread and butter, not pannini and *foie gras*. The only relevant precedent from this Court predates the enactment of the Federal Rules of Evidence by almost a century.

A. The Indictment

Vincent A. Cianci, Jr. is the former mayor of the City of Providence, Rhode Island. Together with four other individuals, including his Chief of Staff, Frank E. Corrente, he was charged with conducting and conspiring to conduct the affairs of a hydra-headed enterprise allegedly consisting of the defendants themselves, thirteen specific

agencies of the City, the City itself, a City vendor, and a campaign finance organization.[1] The *Redacted Indictment* postulated a *de facto* illicit-purpose enterprise which was said to have begun in 1991 and to have conducted its affairs through 1999.[2] In addition to the RICO and RICO

---

[1] Paragraph 38 of the *Redacted Indictment* defined the RICO enterprise in the following terms:

> 38. Defendants VINCENT A. CIANCI, JR., a/k/a Buddy; FRANK E. CORRENTE; RICHARD E. AUTIELLO; EDWARD E. VOCCOLA; JOSEPH A. PANNONE; THE CITY OF PROVIDENCE ("Providence"), and various officers, agencies, and entities of Providence, including, but not limited to, the Office of Mayor, the Office of the Director of Administration, the Providence City Solicitor's Office, the Department of Planning and Development, the Providence Redevelopment Agency, the Tax Collector's Office, the Tax Assessor's Office, the Board of Tax Assessment Review, the Finance Department, the Department of Public Safety, the Providence School Department, the Department of Inspection and Standards, and the Building Board of Review; Friends of Cianci, the political organization of DEFENDANT VINCENT A. CIANCI, JR. a/k/a "Buddy"; and Jere Realty, and others known and unknown to the Grand Jury, constituted an "enterprise" as defined by 18 U.S.C. § 1961(4), that is, a group of individuals and entities associated in fact.

[2] The *Redacted Indictment* alleged that nine schemes were committed between 1991 and 1999. All but two of these schemes were alleged to have occurred in the far narrower two to three year period between 1996 and 1999. *Cianci II* at 80-81.

The Tow List, involving alleged pressure placed on tow companies to contribute to Friends of Cianci as a condition of receiving City business, was the only alleged scheme which spanned the entire period. *Id.* at 80.

A second alleged scheme was said to have lasted from 1991 to 1998: the Jere Lease allegation, charging that a local real estate company had paid bribes and kickbacks to Mr. Cianci's co-defendant, Frank Corrente. *Id.*

(Continued on following page)

conspiracy charges, Mr. Cianci himself was alleged to have committed some eighteen felonies, which the indictment realleged as twenty-five predicate acts for the RICO charges.

The single asserted organizing principle of the enterprise was the shared purpose of enriching and empowering its alleged leader, Mr. Cianci, and his campaign organization.[3] Prior to trial, defendants moved to dismiss the RICO

All the other schemes alleged were narrow both in nature and time frame, particularly in relation to the breadth of legitimate City business:

- 1998: The Ronci estate, alleging extortion of a $10,000 payment in exchange for a tax abatement. *Id.*
- 1996-1997: The Ise Job, alleging a $5000 payment in exchange for a job in a City department. *Id.*
- 1999: The Freitas Lots, alleging that Mr. Cianci supported sale of two lots to an undercover FBI *provocateur* in exchange for a $10,000 payment. *Id.*
- 1998-1999: The Freitas Lease, alleging an attempt to influence the School Department to grant the FBI undercover agent a lease in exchange for $2000. *Id.* at 80-81.
- 1998: The Freitas Invoices, alleging that co-defendant Corrente facilitated payment of the undercover agent's bills as a City vendor in exchange for $1100. *Id.* at 81.
- 1998: The University Club, alleging that Mr. Cianci attempted to influence the Board of Review to deny a variance requested by a private club which had snubbed him. *Id.*
- 1996: The Maggiacomo job, alleging that co-defendant Autiello conspired with an unnamed public official to facilitate the hiring of Mr. Maggiacomo as a police officer in return for $5000. *Id.*

Mr. Cianci was either not charged, or acquitted, of every one of these substantive allegations.

[3] Paragraph 39 of the *Redacted Indictment* defined the alleged common purpose of the enterprise as follows:

(Continued on following page)